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THE EQUITABLE RIGHTS AND LIABILITIES OF STRANGERS TO A CONTRACT.

In the case of a contract for the sale of a *res,* for the breach of which legal damages would not be adequate, it is well settled in most jurisdictions that either party to the contract may have specific performance of it. It is also a general rule that the assignee of the vendor or the vendee may have the specific performance of the contract, and that the transferee of the *res* which is the subject of the contract, unless he can clothe himself with the defense of purchase for value, takes the *res* subject to the equitable duty to carry out the contract. Where, however, the contract is not a contract to sell but relates to the doing or abstention from a particular act, or the plaintiff acquires his right in the contract through some process other than formal assignment, neither the rules of decision nor the theory of rights and liabilities are so clearly worked out. It is the purpose of this article to give some consideration to the legal theories on the basis of which strangers to a contract, specifically performable in equity, acquire rights and are subject to liabilities with respect to it.

I.

Liabilities of Strangers to the Contract.

It was in connection with the attempt to impose restrictions upon the use of land that the possibility of subjecting others than the promisor to the performance of the obligation of a contract received the first and most important development.

Whenever the owners of neighboring plots of land wished to impose restrictions on the use of one plot so as to affect the use

or enjoyment of the neighboring plot by its owner or possessor, the common law afforded three devices by which this result might be accomplished:

(a) If the ownership of both plots was in one person, he might convey one plot, reserving in his favor a right of entry upon condition broken, the condition being that the land conveyed should not be used in a particular manner so as to affect the use of the plot retained.

(b) The owner of one plot upon conveying it might reserve or he might acquire by grant from the neighboring owner an easement for the benefit of the other plot.

(c) The owner of one plot might acquire a covenant from the owner of the other that the latter's land should not be used in a particular way.

Each of these devices, so far as the law courts were concerned, could effect the desired result only in a limited and imperfect manner, and each for historical reasons was subject in varying degree to technical and to some extent artificial rules. All must be effected by the operation of instruments under seal.[1] None of them were applicable to property other than legal interests in land. The law courts afforded no remedy by which they could direct or compel the actual or literal performance of the restriction by the owner of the servient tenement. And in the case of easements and restrictive covenants, the right of the owner of the dominant tenement was restricted to the recovery of damages only for its invasion. The owner of the dominant tenement could not annex his right of entry for condition broken to his land nor could he sell, assign, or devise it.[2] Upon his death the right passed to his heirs, but they took not by descent but by representation.

The common law easement could be created only in a limited class of cases, the law not favoring the creation of new forms of easement not known to the early common law.[3] When reserved

[1] *Right of entry reserved upon condition broken.* Marshall County High School Co. *v.* Iowa Evangelical Synod (1869) 28 Iowa 360. *Easement,* Hewlins *v.* Shippam (1826) 5 Barn. & Cress. 221; Foster *v.* Browning (1856) 4 R. I. 47; Trammell *v.* Trammell (S. C. 1858) 11 Rich. L. 471. *Covenants running with the land,* see Boston & Albany R. R. *v.* Briggs (1882) 132 Mass. 24.

[2] Upington *v.* Corrigan (1896) 151 N. Y. 143, 45 N. E. 359.

[3] Cockson *v.* Cock (1607) Cro. Jac. 125; Keppell *v.* Bailey (1834) 2 My. & K. 517, 535; Ackroyd *v.* Smith (1850) 10 C. B. 164; Hill *v.* Tupper (1863) 2 Hurl. & Colt. 120.

There is not entire agreement as to the true nature of the negative easement, whether it is a property right vested in the owner of the domi-

in favor of a dominant tenement, the easement was annexed to it by operation of law and passed to the subsequent takers of the land, the burden of it passing to all subsequent takers of the servient tenement. This was true even where the holder of the servient tenement was a disseisor,[4] since the disseisin operated only to put an end to the seisin of the prior owner, and did not in itself affect the rights of the owner of the dominant tenement which were not dependent upon seisin. Where, however, the easement was in gross, *i. e.*, reserved in favor of one who had retained no land, it could not be transferred, nor did it burden the land in the hands of subsequent takers.[5]

The restrictive covenant gave rise to legal rights in the covenantee to recover damages for a breach of the covenant by the covenantor. Where the covenant "touched and concerned the land", the benefit of it passed to subsequent takers of the dominant estate,[6] but the passing of the burden of the covenant to the subse-

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nant tenement similar to the right in a positive easement, or a right originating in covenant. See Kine *v.* Jolly [1905] 1 Ch. 480, 487; Washburn, Easements and Servitudes § VI 5. In early law the remedy for interfering with the negative easement was the writ of nuisance. 3 Holdsworth, History of English Law 129. The right to a negative easement could be acquired by prescription. Cross *v.* Lewis (1824) 2 Barn. & Cress. 686; Aldred's Case (1612) 9 Coke 58b; Renshaw *v.* Bean (1852) 18 Q. B. 112, 131; Sury *v.* Pigot Pop. 166, s. c. Shury *v.* Pigot (1626) 3 Bulst. 339. In a proper case, a negative easement may be created by implied grant on the application of the principle that a grantor cannot derogate from his grant. Palmer *v.* Fletcher (1665) 1 Lev. *122; Cox *v.* Matthews (1674) 1 Vent. 237; Rosewell *v.* Pryor (1704) 6 Mod. *116; Tenant *v.* Goldwin (1705) 6 Mod. *311; Swansborough *v.* Coventry (1832) 9 Bing. 305; see also Phillips *v.* Low [1892] 1 Ch. 47. The doctrine of the acquisition of negative easements by prescription has not been favored in the United States, see Washburn, *op. cit.*, § VI 18, but for cases where negative easements were held to be created by reservation, see Peck *v.* Conway (1876) 119 Mass. 546; Rector, *etc.*, Episcopal Church *v.* Mack (1883) 93 N. Y. 488; Cooper *v.* Louanstein (1883) 37 N. J. Eq. 284, and by grant, Brooks *v.* Reynolds (1870) 106 Mass. 31; Toothe *v.* Bryce (1892) 50 N. J. Eq. 589, 25 Atl. 182; Lampman *v.* Milks (1860) 21 N. Y. 505. These cases, as well as the fact that the doctrine of negative easements was well established in English law long before the equitable development of Tulk *v.* Moxhay (1848) 2 Ph. 774, seem to establish that the negative easement was essentially a right in the land, originating in grant, rather than a right arising out of implied covenant.

[4]See Chudleigh's Case (1589-95) 1 Coke 120a, 122a; *In re* Nisbet & Potts' Contract [1905] 1 Ch. 391, aff'd. [1906] 1 Ch. 386; Alexander City, *etc.*, Co. *v.* Central of Ga. Ry. (1913) 182 Ala. 517, 62 So. 745; Le Blond *v.* Town of Peshtigo (1909) 140 Wis. 604, 123 N. W. 157.

[5]Ackroyd *v.* Smith, *supra*, footnote 3; Hill *v.* Tupper, *supra*, footnote 3; see *infra*, footnote 66.

[6]See Rogers *v.* Hosegood [1900] 2 Ch. 388; Nicoll *v.* Fenning (1881) 19 Ch. Div. 258; Duke of Devonshire *v.* Brookshaw (1899) 81 L. T. R. (N. S.) 83; *cf.* Onward Bldg. Society *v.* Smithson [1893] 1 Ch. 1, 12 (*semble*).

quent takers of the servient tenement was much more limited in its operation. To entitle the covenantee or his transferee to maintain an action against the transferee of the covenantor at law it was necessary, according to the English law at least, that there should be tenure between the plaintiff and the defendant,[7] or in some jurisdictions the covenant must relate to or be in support of an easement existing between the land of the plaintiff and that of the defendant.[8]

From the foregoing brief summary, it is apparent that the legal rules relating to servitudes were highly technical in character and limited in their application. The rights of the parties would vary very materially, depending upon the particular category into which their rights fell, and the determination of this question often involved niceties of interpretation, since the rights of the plaintiff would turn upon the question whether the language of the deed of conveyance should be deemed to be a covenant, a reservation of a right of entry, or a reservation or grant of an easement.[9]

It was the province of equity through its doctrines of specific performance to expand the law of restrictions upon the use of property much more completely and scientifically than it had been developed by the law courts. The processes by which courts of equity effected this expansion of the law are more exactly adapted to the formulation of legal rules in conformity to an enlightened morality than were the methods employed by the law courts in developing the law of servitudes, and it is the purpose of this article to trace in outline the development of the equitable doctrine with a view to ascertaining how far the so-called equitable easements or servitudes should be limited in their application by likening them to property rights in the land or to the common law rules relating to servitudes, rather than developed on principles originating in the courts of equity themselves.

All so-called equitable "easements" or "servitudes" have their

[7]Keppell *v.* Bailey, *supra,* footnote 3; see, *infra,* footnote 18.

[8]Morse *v.* Aldrich (1837) 36 Mass. 449, aff'd. 42 Mass. 544; Nye *v.* Hoyle (1890) 120 N. Y. 195, 24 N. E. 1; Gould *v.* Partridge (1900) 52 App. Div. 40, 64 N. Y. Supp. 870; Gilmer *v.* Mobile & Montgomery Ry. (1885) 79 Ala. 569; Whittenton Mfg. Co. *v.* Staples (1895) 164 Mass. 319, 41 N. E. 441; Mott *v.* Oppenheimer (1892) 135 N. Y. 312, 31 N. E. 1097; Crawford *v.* Krollpfeiffer (1909) 195 N. Y. 185, 88 N. E. 29; Countryman *v.* Deck (N. Y. 1883) 12 Abb. N. C. 110; Lydick *v.* Baltimore & Ohio R. R. (1880) 17 W. Va. 427.

[9]See Cassidy *v.* Mason (1898) 171 Mass. 507, 50 N. E. 1027; Watrous *v.* Allen (1885) 57 Mich. 362, 24 N. W. 104; Post *v.* Weil (1889) 115 N. Y. 361, 22 N. E. 145; Los Angeles University *v.* Swarth (C. C. A. 1901) 107 Fed. 798.

origin in contract, expressed or implied, and their nature and extent depends upon the extent to which equity will compel compliance with the contract, not only by and for the parties to it, but by and for third persons whose acts or omissions may in some way affect the rights acquired by the covenant or contract creating the servitude. If A and B are adjoining land owners and B promises for good consideration not to use his land in a particular way affecting the use and enjoyment of A's land, the case is a typical one for the equitable remedy of specific performance. Damages are inadequate both because of their speculative character and because the plaintiff cannot by the expenditure of the damages recoverable at law procure the particular thing stipulated for by the contract or its equivalent. The promise is one of which equity can compel specific performance and there are present, therefore, all the elements entitling the plaintiff to equitable relief by way of specific performance of his contract. If, however, B conveys his land to another upon what theory is his grantee or any subsequent taker affected by the obligation of B's contract? As we have seen, no subsequent taker was under any liability at law unless the contract was under seal, and under the English and some American decisions he was under no liability even if the contract was under seal.

In *Tulk* v. *Moxhay*,[10] Lord Cottenham granted an injunction restraining the defendant, who took with notice, from acting in violation of the terms of a covenant entered into by his predecessor, undertaking to keep a garden on the covenantor's premises "in an open state uncovered by any buildings." The court, for the purpose of the decision, assumed that the defendant was not bound by the covenant at law and rested its conclusion upon the somewhat vague statement that the restriction was "an equity attached to the land by the owner." *Tulk* v. *Moxhay* has been very generally followed in the United States as well as in England, but there is no substantial agreement as to the theory upon which the burden of restrictive covenant is imposed upon subsequent takers of the covenantor's land. Some judges have been of the opinion

[10] *Supra*, footnote 3. In Keppell *v.* Bailey, *supra*, footnote 3, upon a similar state of facts, where Sir Edward Sugden argued in support of the doctrine that the covenant was a burden on the conscience of the taker, relief had been refused, but in Whatman *v.* Gibson (1838) 9 Sim. 196 and in Mann *v.* Stephens (1846) 15 Sim. 376, Vice-Chancellor Shadwell granted an injunction enforcing a restrictive covenant against a purchaser with notice from the covenantor. Knight Bruce, V. C., seems to have regarded the question as an open one in Bristow *v.* Wood (1844) 14 L. J. Ch. 50, and in Moxhay *v.* Inderwick (1847) 1 De G. & Sm. 708.

that the real explanation of *Tulk* v. *Moxhay* was that the covenant in that case was one running with the land at law, and that equity was exercising concurrent jurisdiction over the legal liability for which legal damages were inadequate.[10a] Sir George Jessel in his often-quoted *dictum* in *London and South Western Ry.* v. *Gomm*,[11] said of *Tulk* v. *Moxhay*,

> "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* to another line of cases, or else an extension in equity of the doctrine of negative easement; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light."[11a]

A number of English judges have explained the result reached in *Tulk* v. *Moxhay* on the ground that the restrictive covenant was a "burden on the conscience" of subsequent takers who were not purchasers for value.[12] The late James Barr Ames was of the opinion that the burden of the restrictive covenant was imposed on subsequent takers claiming under the covenantor to prevent their unjust enrichment.[13] A more recent opinion which has received some support in the later opinions of the English courts is an extension of the suggestion made by Jessel in *London and South Western Ry.* v. *Gomm,* to the effect that the covenant creates an equitable property right or right *in rem* in the land of the covenantor which follows the land into the hands of all subsequent takers, except of course innocent purchasers.[14] A recent writer on the subject reaches the conclusion that the doctrine "is a creation of equity which cannot, it is conceived, be supported upon any recognized principle."[15]

It is believed that none of these views conforms wholly to the results reached by the decisions, but that the doctrine that the burden of restrictive covenant "follows the land" into the hands

[10a] See, *infra,* footnote 17.

[11] (1882) 20 Ch. D. 562, 583.

[11a] For judicial opinion containing similar statements see, *infra,* footnote 28. The latter alternative suggested by Jessel has found support in recent English decisions. See, *infra,* footnote 14.

[12] See, *infra,* footnote 36.

[13] 17 Harvard Law Rev. 178, 183.

[14] 17 Columbia Law Rev. 281, 285; Formby *v.* Barker [1903] 2 Ch. 539; *In re* Nisbet & Potts' Contract, *supra,* footnote 4; London County Council *v.* Allen [1914] 3 K. B. 642.

[15] Jolly, Restrictive Covenants 1.

of all but innocent purchasers is an application of the doctrine of equity which is generally recognized and consistently applied in the law of trusts and in the law of specific performance of contracts.

That the burden of the covenant does not run at law, since there is no tenure between the covenantee and the subsequent taker of the premises affected by the covenant, seems to be established by the English cases. This was the decision in *Keppell* v. *Bailey.*[16] Lord Cottenham in *Tulk* v. *Moxhay* assumed that the covenant did not run at law, and although Jessel made an opposite assumption in 1880,[17] the question seems to have been finally put at rest by the decision in *Austerberry* v. *Corporation of Oldham.*[18] Moreover, it was settled that the burden of the covenant did not run at law so as to affect a sub-lessee of the covenantor,[19] but equity, applying the doctrine of *Tulk* v. *Moxhay,* regards the sub-lessee as bound by the covenant regardless of the want of legal obligation on the part of the sub-lessee.[20] Only a covenant, that is to say a promise under seal, is deemed to run with the land at law, but equity will impose the obligation upon subsequent takers where the contract or agreement is not under seal.[21] Moreover, in equity, burdens as well as benefits are deemed to affect equitable interests or "estates" in land, which of course were not subject to the legal rule.[22] These cases make it clear that equity, in imposing a burden of restrictive covenants upon subsequent takers of the land, is doing something more than giving an equitable remedy based on a legal obligation, which runs with the land at law.

Nor is the doctrine of the equitable burden of restrictive covenants an extension in equity of the doctrine in *Spencer's Case,* as was suggested by Jessel. In *Spencer's Case*[23] it was held that the burden of the covenant touching and concerning the land

[16] *Supra,* footnote 3.

[17] *In re* Mercer & Moore (1880) 14 Ch. D. 287.

[18] (1885) 29 Ch. D. 750.

[19] See Hall *v.* Ewin (1887) 39 Ch. D. 74, 81; South of England Dairies, Ltd., *v.* Baker [1906] 2 Ch. 631 (*semble*).

[20] Hall *v.* Ewin, *supra,* footnote 19; John Brothers, *etc.,* Co. *v.* Holmes [1900] 1 Ch. 188; 1 Ames, Cases on Equity Jurisdiction 152 n. 1.

[21] Lewis *v.* Gollner (1891) 129 N. Y. 227, 29 N. E. 81; Trustees of Columbia College *v.* Lynch (1887) 70 N. Y. 440; Tallmadge *v.* East River Bank (1862) 26 N. Y. 105; Hayward Homestead Tract Ass'n. *v.* Miller (1893) 6 Misc. 254, 26 N. Y. Supp. 1091; Nottingham Patent Brick & Tile Co. *v.* Butler (1886) 16 Q. B. D. 778.

[22] John Brothers, *etc.,* Co. *v.* Holmes, *supra,* footnote 20; Rogers *v.* Hosegood, *supra,* footnote 6.

[23] (1583) 5 Coke 16a.

passed to the assignee of the leasehold at law. If equity had taken over this doctrine we should expect it to apply it as against those who had acquired equitable rights to, or, as it is said, had become equitable owners of the leasehold, and that the "equitable owner" would be bound by the covenant in equity in the same way that the legal owner is bound by the covenant in law. But such is not the rule. After some vacillation, it was finally settled by the English courts that a contract to assign a lease did not impose upon the contract purchaser of the leasehold either in law or in equity the obligation to perform the covenants of the lease.[24] Nor would equity at the suit of the covenantee compel the contract purchaser to take an assignment of the land and thus subject himself to the legal burden of the lease.[25]

Nor will Professor Ames' suggestion, that the running of the burden is based on unjust enrichment, bear close scrutiny. He says,[26]

> "To incumber the *res* in the hands of the innocent purchaser for the benefit of the promisee would be to rob Peter to pay Paul. The situation is altogether different, if the *res* is acquired with notice of the restrictive agreement, or by a volunteer. If such a possessor were permitted to ignore the restrictive agreement, he would make an unmerited profit, and this profit would entail an undeserved loss upon the promisee. For the promisee in negative agreements, unlike the promisee in affirmative agreements, has no redress against the promisor. The latter did not violate the restrictive agreement while he was in possession of the *res,* and its violation by a subsequent possessor is no breach of contract by the promisor."

There is an occasional expression in the opinions indicating that the view that the running of the burden of the restrictive covenant in land is based on unjust enrichment has met with judicial favor.[27] To say, however, as Professor Ames does, that if the

[24]Moores *v.* Choat (1839) 8 Sim. *508; overruling Lucas *v.* Comerford (1790) 1 Ves. Jr. 235 and Flight *v.* Bentley (1835) 7 Sim. 149; followed by Cox *v.* Bishop (1857) 8 De G. M. & G. *816 and Purchase *v.* Lichfield Brewery Co. [1915] 1 K. B. 184.

[25]Moores *v.* Choat, *supra,* footnote 24.

[26]17 Harvard Law Rev. 178.

[27]Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." Cottenham, Lord Chancellor, in Tulk *v.* Moxhay, *supra,* footnote 3, at p. 778. "* * * the doctrine of Tulk *v.* Moxhay, properly

purchaser with notice were "permitted to ignore the restrictive agreement" he would make an unmerited profit, is to assume the very point to be determined. Clearly the profit is not unmerited unless the restriction is legally operative and upon some theory or other the purchaser is so acting as to invade the plaintiff's equitable right. Whether or not it is legally operative clearly must be determined before it can be said that there is want of merit in the purchaser's holding the land free from the restriction. Indeed, examples are not wanting in the books of cases where property has been bought at a low price on the assumption that it was subject to restriction and the courts have nevertheless determined that the buyer might hold his purchase free of the restriction.

If, therefore, we eliminate from consideration the several theories that equity gives relief, because the covenant is one burdening the land at law; that equity is only recognizing a legal right for the invasion of which legal damages are inadequate; that the doctrine is only an extension in equity of the doctrine in *Spencer's Case*; and that the burden runs upon the theory of unjust enrichment; there still remains for consideration the alternative suggestion made by Sir George Jessel, that the basis of the running of the burden of restricted covenants is an "extension in equity of the doctrine of negative easements,"[28] and this will require examination and comparison with analogous doctrines in the law of trusts and specific performance.

Where A holds property in trust for B, it is everywhere recognized that B has a right *in personam* against A. Originally, he had

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applied, will enable him to enforce that right as against the Defendant—that is to say, considering that the Defendant obtained this public-house at a less rent, as we may assume he did, by reason of the covenant, we ought not, as against this person entitled to the benefit of that covenant, to allow him to deal with the public-house in a way inconsistent with the covenant by reason of which he got it at a lower rent." Cotton, L. J., in Clegg *v.* Hands (1890) 44 Ch. D. 503, 519. "If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction." Cotton, L. J., in Hall *v.* Ewin, *supra,* footnote 19, at p. 79. "The equity would seem to spring from the presumption that each purchaser has paid an enhanced price for his property, relying on the general plan, by which all the property is to be subjected to the restricted use, being carried out, and that while he is bound by and observes the covenant, it would be inequitable to him to allow any other owner of lands, subject to the same restrictions, to violate it." Green, V. C., in De Gray *v.* Monmouth Beach, *etc.,* Co. (1892) 50 N. J. Eq. 329, 339, 24 Atl. 388.

[28]For similar suggestions see Norcross *v.* James (1885) 140 Mass. 188, 192, 2 N. E. 946; Trustees of Columbia College *v.* Lynch, *supra,* footnote 21; Joy *v.* St. Louis (1890) 138 U. S. 1, 38, 39, 11 Sup. Ct. 243.

no right which could be invaded by third persons, and however extensively third persons interfered with the trust property or participated in any breach of trust, equity afforded him no remedy against anyone but the trustee.[29] Ultimately, equity did in many cases give relief against third persons, and in these cases where there was a breach of trust or a failure on the part of the trustee to perform the trust, the practical consequence of the equitable doctrine was the transformation of the right of the *cestui que trust* from a pure right *in personam* into a right *in rem* so far as the acts of third persons are concerned. The subject matter of the right, however, was the right of the *cestui* against the trustee, and not in the *res* held by the trustee for the benefit of the *cestui*. The suggestion sometimes made,[30] that the right of the *cestui* is an equitable property right in the trust *res* or, as is sometimes said, a right *in rem* in the trust *res* itself, is a convenient expression to describe many of the practical consequences of permitting the *cestui que trust* to assert his right to the trust property when it has found its way into the hands of third persons, but it does not describe the process by which that result is reached, nor does it afford adequate explanation for the want of liability of third persons to the *cestui* where the acts of such third persons are invasions of the legal right of the trustee in the trust *res* unaccompanied by any breach of trust or failure to perform the trust duty by the trustee; nor does it afford an adequate explanation for the liability of third persons in many cases where there has been a breach of trust unaccompanied by any actual interference with the trust *res* by the third person.[31] These results would seem to suggest that the true theory upon which equity imposes liability upon third persons with respect to the trust *res* is, that it imposes upon an indeterminate number of persons a duty of refraining from conduct which aids or makes more effective the failure of the trustee to perform the obligation of the trust to his *cestui*. That this is the basis of imposing liability on third persons with respects to equitable rights is still more apparent in the case of contracts specifically enforceable in equity. When the contract is to sell a specific *res*, the vendee may claim the property from third persons except innocent purchasers. In the same manner, the holder of an option to purchase may claim the property from one not an innocent purchaser for value who acquired the property from the option vendor before

[29] See 1 Ames, cases on Trusts 282, 285.

[30] Professor Austin Wakeman Scott in 17 Columbia Law Rev. 269; *cf.* 17 Columbia Law Rev. 467.

[31] 17 Columbia Law Rev. 467.

the exercise of the option.[32] Here obviously the option vendee had no equitable property in the *res*. Yet the inequity of permitting a third person with notice, or who had parted with no value, to deprive the vendee of the benefit acquired by his contract is obviously the basis of the decisions. This was the basis of the decision in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*,[32a] where the court restrained a third person from purchasing property of the defendant who had contracted to give the plaintiff the "first right of purchase", although the court recognized that the plaintiff had acquired no "property right". Indeed, when the court of equity has jurisdiction over the contract, the same principle governs the liability of third persons where there is no *res* which is the subject matter of the contract. Thus, in *Lumley* v. *Wagner*,[33] where the defendant had a contract to sing exclusively for the plaintiff, a theatrical manager, the court not only enjoined the defendant from singing for a rival manager, but enjoined the rival manager from engaging the defendant in breach of the plaintiff's contract. The law courts adopted a similar principle in *Lumley* v. *Guy*[34] in allowing the plaintiff to recover, in an action on the case, damages sustained through defendant's maliciously inducing one to break his contract with the plaintiff. The exact limits of the doctrine of *Lumley* v. *Guy* still remain to be marked out, but what the law is doing in this and the cases following it is to work out a principle, almost universal in its application, that rights *in personam*, regardless of whether they relate to a specific *res* or not, will be given the character of rights *in rem*, and will thus be clothed with the protection of the law in so far as they are capable of being injured or interfered with by the acts of third persons.

In the case of the restrictive covenant, the covenantee is normally entitled to equitable relief against the covenantor. His right differs from the right of the vendee in matter of form rather than principle. The vendee has the equitable right to compel the vendor to do something with his property, namely, convey it to the vendee, whereas the covenantee has the right to call upon the cove-

[32]Manchester Ship Canal Co. *v.* Manchester Racecourse Co. [1901] 2 Ch. 37; Ross *v.* Parks (1890) 93 Ala. 153, 8 So. 368; Calanchini *v.* Branstetter (1890) 84 Cal. 249, 24 Pac. 149; Maughlin *v.* Perry (1872) 35 Md. 352; Coleman *v.* Applegarth (1887) 68 Md. 21, 11 Atl. 284; Page *v.* Martin (1890) 46 N. J. Eq. 585, 20 Atl. 46; Kerr *v.* Day (1850) 14 Pa. 112; Barrett *v.* McAllister (1890) 33 W. Va. 738, 11 S. E. 220.

[32a]*Supra*, footnote 32, overruling on this point Heathcote *v.* North Staffordshire Ry. (1850) 2 Mac. & G. 100. The court recognized that the principle of the decision was the same as in Lumley *v.* Wagner (1852) 1 De G. M. & G. *604.

[33]*Supra*, footnote 32a.

[34](1853) 2 El. & Bl. 216.

nantor to refrain from using his property in a particular manner. The covenant, as a matter of interpretation, may mean only that the covenantor is personally bound to this course of conduct,[35] or it may mean that the undertaking is that the use of the land, whether by the covenantor or others, shall be permanently restricted in the manner indicated by the covenant. If the latter construction is the correct one, can equity, consistently with its settled doctrines, refuse to impose upon the subsequent taker of the land the duty of refraining from any act interfering with the enjoyment of the covenantee's equitable right acquired by his covenant? And this is precisely what equity does do in enforcing the restrictive covenant. While, as already indicated, a variety of reasons have been assigned in explanation of this result, the principle of decision which seems to conform most completely with the decisions in those other classes of cases in which equity protects a mere claim *in personam* against encroachment by third persons, and which seems most in harmony with moral standards, is that of the equitable duty of non-interference with the covenantee's equitable right upon his covenant.

This view seems to have found acceptance in a qualified way by several of the English judges, who have referred the doctrine of the burden of the covenant's running in equity to the doctrine of "notice",[36] and has been accepted without qualification by a number of American judges.[36a]

[35]Wilson *v.* Hart (1866) 1 Ch. App. Cas. 463. For a case where a covenant apparently was treated as permanent in character and therefore enforceable against a subsequent taker of the land, see Lewis *v.* Gollner, footnote 21.

[36]"Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." Knight Bruce, L. J., in De Mattos *v.* Gibson (1859) 4 De G. & J. 276, 282.

"This suit is not brought to enforce a covenant, but on the ground that the defendant, having purchased land with notice of restrictions as to its use, is not in a position to use it in violation of those restrictions;" Cotton, L. J., in Fairclough *v.* Marshall (1878) 4 Ex. D. 37, 48.

"* * * although he [the defendant] was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Courts of Chancery would not allow him to use the land in contravention of the covenants. This is a sound principle." Cotton, L. J., in Hall *v.* Ewin, *supra,* footnote 19, at p. 79.

[36a]"A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the

This phrase, however, must not be taken as meaning actual notice of the covenant to the subsequent taker, but as referring to any situation which the court of equity regards as precluding the defense of purchase for value and thus placing the defendant in the same situation as though he had had notice, since the courts have consistently applied the doctrine of purchase for value to the doctrine of equitable servitudes, and will enforce the restrictive covenant against the heir or innocent donee. Conformable to principle, however, it may be doubted whether equity would impose any burden with respect to a restrictive covenant upon an innocent heir or donee because of any *bona fide* acts of his before actual or constructive notice of the covenant.[37]

While it is now well settled that equity will enforce restrictive covenants against subsequent takers of the servient tenement, there is still some uncertainty whether it should likewise enforce affirmative covenants requiring affirmative acts to be done on the servient land. Assuming that the covenant is not one in its nature to be performed personally by the covenantor, affirmative covenants will run with the land at law in an appropriate case,[38] and at one time the English courts enforced affirmative covenants in equity against subsequent takers, not purchasers for value, pro-

agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform." Bigelow, J., in Whitney *v.* Union Ry. (1858) 77 Mass. 359, 364.

"* * * there is nothing anomalous in holding that this agreement should be specifically enforced in equity against all taking lot A with notice of that agreement in favor of the owner of the land for the benefit of which the agreement was made. In such a case it may be said and is said that there is an equitable restriction on A in favor of B. But that is apt to be misleading. The so called equitable restriction results from the fact that equity will enforce the agreement against those taking with notice in favor of the then owner of the land to be benefited. Equity does not enforce the agreement because there is an equitable restriction." Loring, J., in Bailey *v.* Agawam Nat'l. Bank (1906) 190 Mass. 20, 23, 76 N. E. 449.

"It will be found upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land." Beaseley, C. J., in Brewer *v.* Marshall (1868) 19 N. J. Eq. 537, 543. See also Andrews, C. J., in Phœnix Ins. Co. *v.* Continental Ins. Co. (1882) 87 N. Y. 400, 408; Hodge *v.* Sloan (1887) 107 N. Y. 244, 17 N. E. 335.

[37]See Eastwood *v.* Lever (1863) 4 DeG. J. & S. *114. The innocent donee of trust property who parts with it before notice is not liable to the *cestui,* Bonesteel *v.* Bonesteel (1872) 30 Wis. 516, and may repurchase the property from an innocent purchaser and hold free of the trust. Mast & Co. *v.* Henry (1884) 65 Iowa 193, 21 N. W. 559.

[38]Barnard *v.* Goodscall (1612) Cro. Jac. 309; Marsh *v.* Brace (1615) Cro. Jac. 334; Twynam *v.* Pickard (1818) 2 Barn. & Ald. 105; see also *supra,* footnote 8.

vided the covenant was one affecting the use and enjoyment of a business or a dominant tenement.[39] In *Haywood* v. *Brunswick, etc., Building Society*[40] the court refused to compel specific performance of a covenant to do construction work upon covenantor's premises by a subsequent purchaser with notice from the covenantor, the court being of the opinion that the doctrine of *Tulk* v. *Moxhay* should be limited to restrictive covenants. Professor Ames was of the opinion that this result was justifiable on the grounds that the purchaser would not be unjustly enriched if equity did not compel performance of the covenant by him, and on the ground that in such a case the covenantee had a right to compensation against the covenantor.[41] The observation already made with reference to the doctrine of unjust enrichment as applicable to restrictive covenants is equally applicable here. If the performance of the covenant were to be deemed obligatory upon the purchaser of the land, his failure to perform it, if sanctioned by the court, would result in his enrichment, since the land in his hands would clearly be more valuable than it would if an incident of its acquisition and retention were liability to expend money upon it. Whether or not, however, the enrichment is unjust must depend in each case upon the answer to the question whether performance of the covenant by the purchaser is obligatory. Nor is it strictly accurate to say that "precisely the same loss" would have fallen on the covenantee if the covenantor had kept the land, if it be assumed that equity would have compelled the covenantor to perform the covenant during the period in which he retained the land. The theory upon which the plaintiff gets equitable relief is that damages for

[39]Cooke *v.* Chilcott (1876) 3 Ch. D. 694; Morland *v.* Cook (1868) L. R. 6 Eq. 252, 265; Aspden *v.* Seddon (1876) L. R. 1 Ex. D. 496.

[40](1881) 8 Q. B. D. 403. See also London & S. W. Ry. *v.* Gomm, *supra,* footnote 11, at p. 583; Austerberry *v.* Corporation of Oldham, *supra,* footnote 18; Clegg *v.* Hands, *supra,* footnote 27. Hayward *v.* Brunswick, *etc.,* Building Society was followed in Miller *v.* Clary (1913) 210 N. Y. 127, 103 N. E. 1114.

[41]"Such purchaser, by refusing to build, does not retain for himself any *res* which ought to go to the promisee. His only benefit is the avoidance of a possibly unprofitable expenditure of money. Nor does this benefit to him imply an unjust pecuniary loss to the promisee. For the latter still has his right to compensation for the promisor's breach of contract. If the promisor is solvent, the promisee will lose nothing; and even if the promisor is insolvent, the promisee's loss, like that of the other creditors, is simply the consequence of misplaced confidence in the pecuniary ability of the common debtor. Moreover, it is precisely the same loss that would have befallen him if the promisor had kept the land. So long as this is true, there is obviously no reason why equity should impose upon the promisor's assignee the constructive duty of fulfilling the latter's promise, and thereby shift the loss from the promisee, who willingly took the risk of the promisor's solvency, to the assignee, who gave no credit." J. B. Ames, 17 Harvard Law Rev. 176.

breach of the covenant are inadequate and that he is entitled to have the covenant itself specifically performed. This equitable right cannot be enforced against the covenantor, since he is out of possession and cannot build on the land. If therefore the plaintiff secures the enjoyment of his equitable right, he can only do it by a mandatory injunction directed against the purchaser, that the purchaser do the construction work or at least permit the covenantor to do it. It therefore seems difficult to distinguish between negative and affirmative covenants on any theory of unjust enrichment.

It has also been suggested that the reason for the distinction made by *Haywood* v. *Brunswick, etc., Building Society* between affirmative covenants and restrictive covenants is that the restrictive covenant is enforceable against third persons only in so far as it gives rise to an equitable property right; that such property rights are created by restrictive covenants but not created by affirmative covenants.[42]

But equity does sometimes impose affirmative obligations on strangers to the obligation because of their inequitable conduct with respect to it. Thus, where at common law a creditor had assigned his claim upon a debt and the debtor with notice of the assignment had paid the assignor, a court of equity would compel the debtor to pay over again. The debtor held no property either for the creditor or his assignee, and payment of the debt extinguished it at law, but the payment by the debtor with notice of the right of the assignee constituted an equitable wrong against the assignee for which equity would compel the debtor to make reparation by paying the amount of the debt to the assignee.[43] So, a debtor who pays his creditor who is a fiduciary, after demand by the fiduciary's principal, may be compelled to pay the debt a second time.[44] Strangers to a trust who aid the trustee in committing a breach of trust, although they do not acquire the trust *res*, may be held to account to the *cestui que trust* for the amount of loss suffered by him by reason of the breach of trust. They do not acquire any property from the trustee nor does the *cestui* have a claim to any property in their hands. Their liability is founded on their inequitable conduct in aiding the trustee in depriving the *cestui* of the benefit of his rights against the trustee.[45]

[42]Professor Austin Wakeman Scott in 17 Columbia Law Rev. 281 n. 48, 285.

[43]17 Columbia Law Rev. 485.

[44]17 Columbia Law Rev. 486.

[45]17 Columbia Law Rev. 486, 487.

The transferee of land held subject to a trust who takes with notice of the trust may be compelled to convey to the *cestui* with covenants of warranty.[46] So far as the *cestui* may be said to have an equitable right in the trust property that may be satisfied by a quit-claim deed of the property. The affirmative duty to warrant is not one arising from the mere acquisition of the trust property by the defendant, but arises from the tortious act of the defendant in interfering with the plaintiff's right *in personam* against the trustee.

There is, therefore, no equitable principal which would deny the jurisdiction of equity to impose affirmative obligations on the taker of property held subject to such an equitable obligation where equity would compel the covenantor to perform the obligation while the property is in his possession, since the acquisition of the property without performing the obligation would tend to deprive the covenantee of the benefit of his covenant. The real question, then, is how far should equity in its discretion compel the performance of affirmative acts requiring the supervision of the court. Equity frequently refuses to compel the performance of such acts by the covenantor or promisor, not for want of jurisdiction, but on grounds of expediency. And, obviously, wherever equity would not enforce performance of the covenant by the covenantor, it should not impose the burden of the covenant on subsequent takers of the property from the covenantor. Since, however, the court has jurisdiction even in such a case, justice could be done and the difficulty could be avoided by a decree which should direct that the defendant purchaser be restrained from interfering with the covenantee; that the covenantee be permitted to do the construction work on the purchaser's land; that in the meantime the bill be retained and the defendant or the covenantor, according to the equities of the case, be directed to pay to the plaintiff the fair cost of the construction. Such a result would be more consistent with sound principle than the result reached in *Haywood* v. *Brunswick, etc., Building Society,* which would seem to be justified, if at all, upon grounds of expediency.

If the view here expressed, that the burden of the restrictive covenant is imposed on third persons in order to avoid depriving the covenantee of the benefit of his equitable rights upon his contract, is sound, it would follow: (a) that the liability of the third person will depend not upon his acquiring the property right or interest

[46] 17 Columbia Law Rev. 490 n. 61.

of the covenantor, but on the nature of his act or threat as tending to interfere with or defeat the equitable rights of the covenantee; (b) that the doctrine is equally applicable to agreements affecting personal property; (c) that the doctrine is applicable to contracts where no property right is to be acquired by the promisee other than the property right in the contract itself, provided the contract is one which equity will enforce between promisor and promisee; (d) that the application of the doctrine should be limited only by the exercise of the discretionary powers of courts of equity with respect to sound public policy and not by analogy to common law easements or other property rights.

(a) Reference has already been made to the fact that the English courts have refused to impose upon the contract purchaser of a leasehold as "equitable owner" the burdens of the covenants in the lease before actual assignment of the lease to him.[47] On the other hand, they have held that the mere occupant of the land, with respect to which a previous possessor has entered into a restrictive covenant, will be restrained from violating the terms of the covenant,[48] and in *In re Nisbet & Pott's Contract*[49] it was held that the burden of the covenant would run against a disseisor. The distinction bewteen the two classes of cases seems clearly to be the one already indicated, *viz.*, that the defendant's threatened act in the case of the occupier or disseisor is one which would tend to deprive the covenantee of the benefit of the equitable right on his contract, whereas the act of the contract purchaser of the leasehold although it makes him "equitable owner" of the leasehold does not in itself have that effect. The decision in *In re Nisbet & Pott's Contract* has been supposed to established the character of the restrictive covenant as creating an equitable property right in the land itself in the nature of an equitable easement which would follow the land into the hands of a disseisor just as is the case with an easement at common law, and this, it is urged, is inconsistent with, and a real advance beyond, the rule that a disseisor of the trust *res* is not bound by the trust.[50] It is believed that the decision in *In re Nisbet & Pott's Contract* is one which

[47]See *supra*, footnote 25. This is equally true if he goes into possession of the premises, but does not interfere with the performance of the covenant. Purchase *v.* Lichfield Brewery Co., *supra*, footnote 24.

[48]Mander *v.* Falcke [1891] 2 Ch. 554.

[49]*Supra*, footnote 4.

[50]17 Columbia Law Rev. 285.

emphasizes the character of the equitable right as a right *in personam* against an equitable obligee which gives rise to rights against third persons only so far as the acts of third persons tend to interfere with the enjoyment of the right *in personam* of the equitable claimant. The duty of the trustee is to hold the legal interest in the trust *res,* that is, to exercise his legal rights in it for the benefit of the *cestui que trust.* There is no breach of this duty to the *cestui* and no interference with the equitable rights of the *cestui* when a third person trespasses upon the trust *res* or disseises the trustee, and consequently equity gave no rights to the *cestui que trust* with respect to a mere trespass or disseisin. In the case of restrictive covenants which, in equity, affect subsequent takers of the land, the obligation of the covenantor is absolute in character, since it is contractual and relates exclusively to the physical user of the land, and not to the covenantee's legal interest in it as does the obligation of the trustee.

The covenant is that the land shall or shall not be used in a particular way. The *cestui que trust* by the creation of the trust acquires no right against the trustee not to have the land trespassed upon or disseised. The covenantee does acquire a right against his covenantor not to have the land built upon or used in a particular way, and that right may be defeated quite as effectually by the act of a trespasser or disseisor as by an act of the covenantor himself.[51] Conceivably, upon a different principle equity might have given to the *cestui que trust* rights against the disseisor but that it did not do so, while giving rights on the restrictive covenant against the purchaser or disseisor leads inevitably to the conclusion that the right which it has protected from interference is the right *in personam* against the covenantor rather than an equitable property right in the land held subject to the restrictive covenant.

[51]That the covenantor may remain bound at law after he has transferred his land is clear, both on principle and authority, Palethorpe *v.* Home Brewery Co., Ltd. [1906] 2 K. B. 5, and although it has been held in certain cases that the covenantor was not bound after transferring his interest, this is clearly a matter of interpretation. Toleman *v.* Portbury (1870) L. R. 5 Q. B. 288; Wilson *v.* Twamley [1904] 2 K. B. 99. In equity, however, no relief by way of specific performance could be had against the covenantor since he is out of possession, unless he was doing some act in aiding the possessor in interfering with plaintiff's enjoyment of his equitable right. Clements *v.* Welles (1865) L. R. 1 Eq. 200; Feilden *v.* Slater (1869) L. R. 7 Eq. 523. The liability of the transferee in equity does not depend upon continued liability of the covenantor, but on his act in acquiring the property from the covenantor who was subject to the covenantee's equitable rights.

(b) If the burden of the restrictive covenant is made to run in order to protect adequately the right of the covenantee upon his contract, it would follow that the doctrine would be equally applicable to personal property where the contract is one which would be specifically enforced between the covenantor and the covenantee. If, however, the basis of the decisions is the doctrine of "equitable easement", it would follow that the doctrine could have no application to chattels since there is no law of easements or of dominant and servient tenement with respect to chattels.

This was the conclusion reached in *De Mattos* v. *Gibson*,[52] by Vice-Chancellor Knight Bruce, who was of the opinion that every consideration which would lead equity to restrain third persons from violating the restrictive covenant affecting land would require a similar result in the case of chattels. Certainly the injury suffered by the plaintiff would be as great and the moral quality of the defendant's act in acquiring the chattel and repudiating the covenant would be the same as in the case of land. "Reason and policy seem to prescribe that * * * the acquirer shall not, to the material damage of a third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."[53]

The doctrine of *De Mattos* v. *Gibson* was applied in *Catt* v. *Tourle*[54] and *Luker* v. *Dennis*.[55] Doubt, however, has been thrown upon these authorities by later cases,[56] and the English courts have refused to enforce restrictions on the price at which chattels may be resold on the ground that the doctrine of restrictive covenants does not apply to chattels.[57] In the United States we have reached the same result on the ground that such price restrictions were

[52] *Supra,* footnote 36.

[53] Knight Bruce, L. J., in De Mattos *v.* Gibson, *supra,* footnote 36, at p. 282.

[54] (1869) 4 Ch. App. Cas. *654.

[55] (1877) 7 Ch. D. 227.

[56] See Formby *v.* Barker, *supra,* footnote 14; London County Council *v.* Allen, *supra,* footnote 14.

[57] A contract against reselling at less than a specified price was held valid as between the parties to it, Elliman, Sons & Co. *v.* Carrington & Son, Ltd. [1901] 2 Ch. 275, and it would furnish the basis for equitable relief in a proper case. But a buyer with notice from promisor was held not liable in Taddy & Co. *v.* Sterious & Co. [1904] 1 Ch. 354; McGruther *v.* Pitcher [1904] 2 Ch. 306. With reference to the right of a patentee to restrict the use of patented articles see Werderman *v. Société Générale D'Electricité* (1881) 19 Ch. D. 246. As to the effect of restrictive agreements respecting patented articles see an article by Professor Thomas R. Powell in 17 Columbia Law Rev. 663. See also 10 Harvard Law Rev. 1.

illegal restraints of trade.[58] On the other hand, where a third person actually induced the purchaser to resell plaintiff's goods at less than the stipulated price, the English courts[59] have granted an injunction against the third person on the doctrine of *Lumley* v. *Guy*. They have also enforced a covenant against reselling news gathered and sold by the plaintiff, the injunction extending to third persons who contracted with the purchaser in violation of his agreement.[59a] The English courts have enforced the brewers "tied house" covenants in favor of the successor to a business,[60] and in one case at least,[61] they have imposed the burden of a restrictive covenant on a business in the hands of a purchaser who acquired the business subsequent to the execution of the covenant. The doctrine of the equitable mortgage by agreement, fully accepted in England and in most of the United States, and the doctrine of the equitable mortgage by pledge of title deeds, well settled in England and followed to a limited extent in the United States, is referable to the like doctrine of specific performance enforceable against all takers of the *res* with notice. These cases all exhibit the necessisty of some adequate theory for protecting the equitable rights of a promisee when the promise relates to personal property, from infringement by the acts of third persons. The tendency in the United States has been to apply the doctrine of restrictive agreements to personal property when not regarded as an unlawful restraint of trade or in violation of public policy. And where the question has arisen it has been generally held that the restrictive covenant affecting chattels will be enforced against all but innocent purchasers where legal damages are inadequate,[62] a result which seems entirely consistent with principle.

(c) Reference has already been made to the fact that the right *in personam* on a contract gives rise to a right *in rem* with respect

[58]Dr. Miles Medical Co. *v.* Park & Sons Co. (1911) 220 U. S. 373, 31 Sup. Ct. 376. See also Garst *v.* Hall & Lyon Co. (1901) 179 Mass. 588, 61 N. E. 219, in accordance with the English authorities.

[59]National Phonograph Co., Ltd., *v.* Edison-Bell Consol. Phonograph Co., Ltd. [1908] 1 Ch. 335.

[59a] Exchange Tel. Co., Ltd. *v.* Central News, Ltd. [1897] 2 Ch. 48; *cf.* Exchange Tel. Co., Ltd. *v.* Gregory [1896] 1 Q. B. 147.

[60]Luker *v.* Dennis, *supra,* footnote 55; Catt *v.* Tourle, *supra,* footnote 54; Osborne *v.* Bradley [1903] 2 Ch. 446; Rice *v.* Noakes & Co. [1900] 1 Ch. 213; *cf.* Noakes & Co. *v.* Rice [1902] A. C. 24, 35; John Brothers, *etc.,* Co. *v.* Holmes, *supra,* footnote 20; *cf.* Francisco *v.* Smith (1894) 143 N. Y. 488, 38 N. E. 980.

[61]Wilkes *v.* Spooner (1910) 27 T. L. R. 157.

[62]Murphy *v.* Christian Press, *etc.,* Co. (1899) 38 App. Div. 426, 56 N. Y. Supp. 597; New York Bank Note Co. *v.* Hamilton Bank Note

to others than the promisor, so that it is an actionable wrong for a third person, knowingly, to induce the promisor to break his contract.[63] Where legal damages for such an injury are inadequate equity should restrain its commission. In *Lumley* v. *Wagner* where A had agreed to serve B exclusively and not to serve anyone else, it was held that equity would not only restrain A from singing for a third person but would restrain the third person from employing A in violation of her contract with the plaintiff. Obviously, the only property right to be protected here is the property right of the plaintiff in the contract itself, and if the contract is one which equity should specifically perform against the promisor, equity should not hesitate to restrain third persons from any act which would prevent the plaintiff from receiving the benefit of performance of his contract. May this doctrine be applied where the particular right stipulated for relates to property which, if secured by specific performance, is neither a common law property right nor analogous to one? If, for example, A contracts to convey an easement of way to B and the contract were specifically performed, B would acquire a property right in the land. Hence, applying the formula that equity regards as done what ought to be done, those who support the equitable property theory contend that the covenantee is equitable owner of the easement of way in A's land, and that subsequent takers of the land, not purchasers in good faith, are affected by plaintiff's equitable rights in the same way that they would be affected by legal ownership of a right of way, and that this is the real explanation of the running of the burden of restrictive covenants in equity.[64] From this it ought to follow that if the particular right or privilege stipulated for were something less than a property right, equity ought not to impose the burden of the covenant on subsequent takers of the servient tenement since there is no property right involved.

Reference has already been made to the fact that equity enforces option agreements against all who acquire land of the option vendor who were not purchasers for value, even though the purchase is effected before the exercise of the option.[65] In such cases the

Co. (1898) 28 App. Div. 411, 50 N. Y. Supp. 1093; Standard American Pub. Co. *v.* Methodist Book Concern (1898) 33 App. Div. 409, 54 N. Y. Supp. 55; Littlefield *v.* Perry (1874) 88 U. S. 205; *cf.* Clark *v.* Flint (1839) 39 Mass. 231.

[63] See *supra*, footnote 34.

[64] 17 Columbia Law Rev. 281, 285.

[65] See *supra*, footnote 32.

only property right involved before the exercise of the option is the plaintiff's property in the contract itself. Legal damages being inadequate, equity protects the right not only as against the promisor, but as against third persons who are unable to clothe themselves with the defense of purchase for value.

Notwithstanding these decisions which seem sound on principle, courts have experienced not a little difficulty in dealing with restrictive agreements which give to a plaintiff rights which are, in effect, contract rights to an easement in gross or to a common law license. The easement in gross, although conferring on the grantee rights in the grantor's land which cannot be revoked at law as between the grantor and grantee, is thus something more than a license. But at common law it is a more tenuous and uncertain right than an easement, since in most jurisdictions it could not be assigned[66] and in many it does not burden the land at law as against subsequent takers of the servient tenement.[67] In such a jurisdiction a restrictive covenant reserved in favor of one who had retained no land would create a mere equitable right analogous to an easement in gross, and if the analogy to the common law of property were followed equity would not impose the burden of the restrictive agreement on subsequent takers of the land. This was the holding in *Formby* v. *Barker*,[68] followed in *London County Council* v. *Allen*.[69] In the latter case the governing body of the City of London, wishing to keep a certain space in the city open and free from buildings, conveyed the *locus quo*, taking a restrictive covenant that the land should not be built upon. The grantee sold the land to the defendant who had notice of the covenant. It was held that the London County Council as covenantee was not entitled to any equitable relief against the defendant on the ground that the kind of right

[66]Ackroyd *v.* Smith, *supra*, footnote 3; Garrison *v.* Rudd (1858) 19 Ill. 558; Louisville & Nashville R. R. *v.* Koelle (1882) 104 Ill. 455; Cadwalader *v.* Bailey (1891) 17 R. I. 495, 23 Atl. 20; Boatman *v.* Lasley (1873) 23 Oh. St. 614; Wagner *v.* Hanna (1869), 38 Cal. 111; Whaley *v.* Stevens (1883) 21 S. C. 221 (not descendible); *contra*, Goodrich *v.* Burbank (1866) 94 Mass. 459; Standard Oil Co. *v.* Buchi (1907) 72 N. J. Eq. 492, 66 Atl. 427; Mayor, *etc.*, of N. Y. *v.* Law (1891) 125 N. Y. 380, 26 N. E. 471 (*semble*).

[67]Hill *v.* Tupper, *supra*, footnote 3 (*semble*); Ackroyd *v.* Smith, *supra*, footnote 3; Wagner *v.* Hanna, *supra*, footnote 66; Boatman *v.* Lasley, *supra*, footnote 66; *contra*, Owen *v.* Field (1869) 102 Mass. 70; Borough Bill Posting Co. *v.* Levy (1911) 144 App. Div. 784, 129 N. Y. Supp. 740 (*semble*). See 7 Columbia Law Rev. 536.

[68]*Supra*, footnote 14.

[69]*Supra*, footnote 14.

stipulated for was not a property right because there was no dominant tenement. That the plaintiff could have restrained the covenantor does not seem open to doubt, for the plaintiff had a substantial interest in maintaining an open space which would have rendered legal damages speculative and inadequate.[70] Had the plaintiff retained land in the neighborhood, however insignificant, it could have restrained the defendant. It is not to be wondered at that one of the judges writing the prevailing opinion regarded the decision based on such a narrow and technical distinction as "regrettable" and that he reluctantly acquiesced in the result because he regarded himself as concluded by authority of *Formby* v. *Barker* and cases following it. Admittedly, there was abundant earlier authority for the proposition that the running of the burden depended not upon the plaintiff's property right but upon "notice" to the defendant, but these had been swept away by *Formby* v. *Barker* and it was for a higher court to lay down a different rule.

The question seems to be an open one in most of the United States. The question was involved in *St. Stephen's Church* v. *Church of Transfiguration*[71] which was decided on other grounds. The doctrine of *Formby* v. *Barker* was followed in *Los Angeles University* v. *Swarth*,[72] and the opposite rule was applied in *Borough Bill Posting Co.* v. *Levy*[73] and in *Van Sant* v. *Rose*,[74] holding that a restrictive covenant burdened the land in the hands of the subsequent taker even where there was no dominant tenement.

And this, it is submitted, is the view which should prevail. There is no reason why equity, which has made a distinct advance over the rules of property recognizing that equitable rights *in personam* are themselves a species of property worthy of protection, should set limits upon the protection which it affords, by analogy to rules of property developed before Sir Edward Coke's time and which it has actually to some extent supplanted. If the plaintiff has an equitable right on his covenant, that is, one which equity will

[70]Prospect Park, *etc.*, R. R. *v.* Coney Island, *etc.*, R. R. (1894) 144 N. Y. 152, 39 N. E. 17; Joy *v.* St. Louis, *supra*, footnote 28; cases cited in 1 Ames, Cases on Equity Jurisdiction, 86 n. 7; Kelly *v.* Central Pac. Ry. (1888) 74 Cal. 557, 16 Pac. 386.

[71](1911) 201 N. Y. 1, 94 N. E. 191; *cf.* opinion in the court below (1909) 130 App. Div. 166, 114 N. Y. Supp. 623.

[72]*Supra*, footnote 9.

[73]*Supra*, footnote 67.

[74](1913) 260 Ill. 401, 103 N. E. 194; Vansant *v.* Rose (1912) 170 Ill. App. 572.

enforce by compelling the covenantor to perform; if the injury to plaintiff is equally great and the act of the defendant is equally unconscientious, as in the case where a specific performance would give the plaintiff a property right; then equity should not deny relief merely because the result of a specific performance does not fall within one of the categories of property recognized as such by the courts of common law.

In many cases where a covenantee retains no land there would be no appreciable damage to him by the breach of the covenant. If A, who owned no other land in the neighborhood, sold his land subject to a covenant that it be used for church purposes only, it could not be said that, under ordinary circumstances, A would suffer any appreciable damage by a breach of the covenant which would require the exercise of equitable jurisdiction. It is true that where there is a dominant tenement in land, the covenantee may enforce the covenant regardless of the amount of damages,[75] for the performance of the covenant actually affects the use of the plaintiff's land, and confers upon him a right with respect to it which in legal contemplation is unique, and for the loss of which legal damages would be inadequate. But where the plaintiff's right is a reversion in the dominant tenement, he must show actual damage in order to invoke equitable relief upon the covenant against the tenant or possessor,[76] and it would seem that the covenantee who does not possess any dominant estate whatever would be in like situation.[77] Where, as in some jurisdictions, negative easements are enforced in equity regardless of the nature or amount of the damage,[78] it would follow that the restrictive covenant in gross would burden the land in the hands of a subsequent taker not an innocent purchaser. Such appears to be the rule in Illinois, where it is established that negative covenants may be enforced in equity merely because they are negative,[79] and, consequently, it is held that the restrictive covenant in gross burdens the land in the hands of an innocent purchaser.[80]

[75]Lord Manners *v.* Johnson (1875) 1 Ch. D. 673; 1 Ames, Cases on Equity Jurisdiction, 131 n. 4.

[76]Johnstone *v.* Hall (1856) 2 K. & J. 414.

[77]Formby *v.* Barker, *supra,* footnote 14, may be explained on this ground, for in distinguishing this case from De Mattos *v.* Gibson, *supra,* footnote 36, the court said at p. 553, "* * * it is plain the learned judge would not have thought an injunction ought to have been granted * * * unless the plaintiff had sustained material damage."

[78]5 Columbia Law Rev. 153; Professor Langdell in 1 Harvard Law Rev. 383.

[79]Andrews *v.* Kingsbury (1904) 212 Ill. 97, 72 N. E. 11.

[80]Van Sant *v.* Rose, *supra,* footnote 74.

Where a covenantee must show inadequacy of legal remedy to entitle him to equitable relief *Formby* v. *Barker* should be followed, but there may be such inadequacy where the plaintiff had retained no land when the covenant affected the plaintiff's business as in the "tied house" covenant or the billboard license.[81] *London County Council* v. *Allen* was a clear case of inadequacy of legal remedy which should entitle the covenantee to equitable relief. The public interest of the plaintiff in having the contract performed was sufficient to establish the inadequacy of legal remedy entitling the plaintiff to his equitable relief.[82]

Where A consents that B shall do something on A's land the consent operates to defeat any claim which A might otherwise have for B's trespass through the plea of leave and license. The license confers upon the licensor no property right in the land, or right which, if enforced, would be analogous to a property right. This is true even where the license is promissory in character and given for good consideration.[83] It follows that if the license is revoked any subsequent exercise of the license privilege by the licensee is a trespass actionable as such, which may be repelled by necessary force, although the revocation may be a breach of contract for which the licensor must respond in legal damages.[84] These consequences do not result from any rule of law peculiar to the law of license but follow logically from the rule that the license does not create or convey any legal interest in the land, and that the sole effect of the license in the event of its breach is to give rise to a right to recover damages for breach of contract. There are, of course, certain types of licenses which have been deemed irrevocable upon grounds of policy, such as the license obtained by the pas-

[81]Willoughby *v.* Lawrence (1886) 116 Ill. 11, 4 N. E. 356; Borough Bill Posting Co. *v.* Levy, *supra,* footnote 67; Goldman *v.* New York Advertising Co. (1899) 29 Misc. 133, 60 N. Y. Supp. 275.

[82]See *supra,* footnote 70.

[83]Wood *v.* Leadbitter (1845) 13 M. & W. *838; Marrone *v.* Washington Jockey Club (1913) 227 U. S. 633, 33 Sup. Ct. 401; Shubert *v.* Nixon Co. (1912) 83 N. J. L. 101, 83 Atl. 369; Horney *v.* Nixon (1905) 213 Pa. 20, 61 Atl. 1088; Boswell *v.* Barnum & Bailey (1916) 135 Tenn. 35, 185 S. W. 692; see Wiseman *v.* Lucksinger (1881) 84 N. Y. 31; Fletcher *v.* Livingston (1891) 153 Mass. 388, 26 N. E. 1001; see also 13 Michigan Law Rev. 401; 17 Columbia Law Rev. 546.

[84]Kerrison *v.* Smith [1897] 2 Q. B. 445; Johnson *v.* Wilkinson (1885) 139 Mass. 3, 29 N. E. 62; *cf.* McCrea *v.* Marsh (1858) 78 Mass. 211; People *ex rel.* Burnham *v.* Flynn (1907) 189 N. Y. 180, 82 N. E. 169; Walsh *v.* Hyde & Behman Amusement Co. (1906) 113 App. Div. 42, 98 N. Y. Supp. 960; Taylor *v.* Cohn (1906) 47 Ore. 538, 84 Pac. 388; Weber-Stair Co. *v.* Fisher (Ky. 1909) 119 S. W. 195; and see cases in footnote 70 (*semble*).

senger from a common carrier,[85] or by a guest at an inn,[86] and to a limited extent the license coupled with an interest,[87] the interest being any kind of property right, the enjoyment of which cannot be exercised without the exercise of the license. In each of these cases, although the license is not property, a revocation of it is not permitted at law in the case of the carrier and the innkeeper, since it would amount to the repudiation of a public duty imposed upon them, and in the case of the license coupled with an interest it would authorize the forcible deprivation of the licensee of enjoyment of his property in the so-called "interest". The effect of the legal rule as to the revocability of licenses except in these cases is to deny the licensee the right of self-help in order to secure the enjoyment of his right of contract, and the explanation of the doctrine that a license coupled with an interest is irrevocable seems to be that the law deems the license irrevocable since the recognition of the power to revoke would amount to a denial of the licensee's right to self-help with respect to his property.

Should equity enjoin the breach of a contract for a license where legal damages are inadequate, or should it refuse relief because the law regards the license as revocable when it is merely a contract right not connected with any other legal right or interest in the licensee? Whatever view may be taken of the assumption sometimes made that there is a legal right to break a contract, and to substitute for the performance of the contract the payment of damages, this doctrine is not one which has found acceptance by courts of equity where the legal damages are inadequate. The fact that the right stipulated for by the contract of license is one revocable at law because it is only a contract should be no answer to a bill for specific performance where the legal damages for the breach of contract are inadequate. To hold otherwise would lead to the absurdity that a contract by A to grant to B an easement of way for 20 years would be specifically enforceable, whereas a contract to permit B to maintain a drain over A's land for 20 years would give rise to no rights in equity. Even in the former case, the right is a right analogous to a common law property right and the latter is a mere license.[88] Moreover, the policy of the rule that

[85]Butler *v.* Manchester, *etc.*, Ry. (1888) 21 Q. B. D. 207.

[86]De Wolf *v.* Ford (1908) 193 N. Y. 397, 86 N. E. 1173.

[87]Wood *v.* Manley (1839) 11 Ad. & E. 34; Cornish *v.* Stubbs (1870) L. R. 5 C. P. *334; Mellor *v.* Watkins (1874) 9 Q. B. 400; *cf.* Williams *v.* Morris (1841) 8 M. & W. *488; Hetfield *v.* Baum (1852) 35 N. C. 394.

[88]See Wiseman *v.* Lucksinger, *supra*, footnote 83. Here equitable relief was denied to one who had contracted with the licensor for the privilege

the license is revocable at law in order to avoid conferring upon the licensee the right of self-help has no application in equity where the right is determined and protected by injunction. That equity should give relief was early recognized in *Frogley* v. *Lovelace,*[89] where Wood, Vice-Chancellor, enjoined a landowner from revoking his contract to permit the plaintiff to sport over the defendant's land, and upon similar principles relief was given in *Duke of Devonshire* v. *Eglin,*[90] where the court enjoined the revocation of a license given for good consideration to permit the plaintiff to carry water in the conduits across the defendant's land.

The doctrine which obtains in some jurisdictions, that an oral license acted upon is irrevocable at law, is an application of the equity doctrine that a donor who has made an oral gift of land not actually carried out will be restrained from interfering with the donee who has gone into possession and has expended money or otherwise changed his position in reliance upon the gift.[91] Only in this way can equity relieve from the loss which would be suffered by the donee because of his reliance upon the donor's promise if the donor were allowed to annul his legal rights as owner of the fee. Courts of equity will issue an injunction restraining the revocation of the license, where the licensee has acted on a parol license with an expenditure of money or labor,[92] and in many jurisdictions law courts have taken over this doctrine and treat the license as irrevocable.[93] Obviously unless so treated by the law courts the licensee is remediless, since there is no contract entitling him to damages for its breach. Where, however, the license has not been acted upon

of constructing a drain across the licensor's premises, on the ground that the license by its terms was only at the pleasure of the licensor.

[89](1859) Johns. 333.

[90](1851) 14 Beav. 530. See also James Jones & Sons, Ltd. *v.* Tankerville [1909] 2 Ch. 440, where plaintiff enjoined defendant from revoking a license permitting plaintiff to cut wood on defendant's land.

[91]Welch *v.* Whelpley (1886) 62 Mich. 15, 28 N. W. 905; Young *v.* Overbaugh (1895) 145 N. Y. 158, 39 N. E. 712; Messiah Home for Children *v.* Rogers (1914) 212 N. Y. 315, 106 N. E. 59; and see cases collected in 1 Ames, Cases on Equity Jurisdiction, 307 n. 4, 309 n. 11.

[92]Duke of Devonshire *v.* Eglin, *supra,* footnote 90; Rerick *v.* Kern (Pa. 1826) 14 S. & R. 267; Southwestern R. R. *v.* Mitchell (1882) 69 Ga. 114; Western Union Tel. Co. *v.* Georgia R. & B. Co. (D. C. 1915) 227 Fed. 276; Shaw *v.* Proffitt (1910) 57 Ore. 192, 109 Pac. 584, 110 Pac. 1092; Metcalf *v.* Hart (1891) 3 Wyo. 514, 27 Pac. 900; see 9 Illinois Law Rev. 281; *contra,* Morse *v.* Lorenz (1914) 262 Ill. 115, 104 N. E. 237; *cf.* Finch *v.* Theiss (1915) 267 Ill. 65, 107 N. E. 898; Baynard *v.* Every Evening Printing Co. (1910) 9 Del. Ch. 127, 77 Atl. 885.

[93]Minneapolis Mill Co. *v.* Minneapolis & St. L. Ry. (1892) 51 Minn. 304, 53 N. W. 639; Rerick *v.* Kern, *supra,* footnote 92; Dark *v.* Johnston (1867)

and rests exclusively upon contract for which the licensee has given consideration, his only remedy at law is for legal damages for the breach of his contract.

In *Wood* v. *Leadbitter*[94] the plaintiff, who had purchased a ticket entitling him to visit a race-course maintained by the defendant, brought an action for assault for excluding him, the plaintiff, from the premises in violation of the contract of license. The court held that the defendant was not liable for the assault, since the license is revocable at law, and this case has been generally followed both in England and the United States. But in *Hurst* v. *Picture Theatres, Ltd.*,[95] upon a similar state of facts, it was held that the proprietor of the theater was liable for assault for forcibly removing the ticket-holder from the theater although using no more force than was necessary. The Court of Appeal, in reaching this conclusion, recognized the authority of *Wood* v. *Leadbitter* as determining the legal rule, but held that the equitable right of the plaintiff upon his contract was one that the court since the enactment of the Judicature Act was bound to recognize as irrevocable for all purposes, since it might have been enjoined by a court of equity. Whatever may be thought of the particular application of the rule in *Hurst* v. *Picture Theatres, Ltd.*, it is clear authority for the proposition, that, in a proper case where damages are inadequate, equity should exercise its jurisdiction to enjoin a breach of contract even though the only property or interest of the plaintiff is his interest in the contract itself.[96] While it is true that in most cases of specific performance the jurisdiction of the court is exercised in compelling performance of the defendant's promise to give something to the plaintiff, it is not infrequently exercised to compel the defendant to render a service to the plaintiff or to give to the plaintiff an exclusive privilege by enjoining the defendant from entering upon a course of conduct interfering with the privilege or otherwise injurious to the plaintiff although no prop-

55 Pa. 164; Phillips *v.* Cutler (1915) 89 Vt. 233, 95 Atl. 487; United States *v.* Baltimore & Ohio R. R. (D. C. 1875) 24 Fed. Cas. No. 14,510; *contra*, St. Louis Nat'l. Stock Yards *v.* Wiggins Ferry Co. (1885) 112 Ill. 384; Crosdale *v.* Lanigan (1892) 129 N. Y. 605, 29 N. E. 824; White *v.* Manhattan Ry. (1893) 139 N. Y. 19, 34 N. E. 887.

[94] *Supra*, footnote 83.

[95] [1915] 1 K. B. 1.

[96] The decision in Hurst *v.* Picture Theatres, Ltd., *supra*, footnote 95, has been criticised on the ground that the contract was not for a property interest. See 31 Law Quarterly Rev. 217; 13 Michigan Law Rev. 401.

erty right is involved.[97] The obligation of the contract coupled with the inadequacy of damage is sufficient to give the jurisdiction. All contracts of license fall clearly within the principle of the case when legal damages are inadequate and it is upon this principle that equity has not infrequently specifically enforced license contracts as between the parties to them.[98]

If A by contract stipulates that B should have a license upon A's land, does such a contract give rise to rights against third persons with respect to the license either in law or equity, that is to say, will the license contract "burden the land" in the hands of subsequent takers not *bona fide* purchasers? Since at common law the license gave to B no right in the land, before *Lumley* v. *Guy* there was no legal theory upon the basis of which the licensee could recover against third persons for interference with his rights. But with the recognition in *Lumley* v. *Guy* that a contract is itself a right *in rem* as to third persons, there is a possibility at least that a license contract may receive such protection at law, and there is at least one case in which it has been held that one entitled to a license upon oral contract may, until the license is revoked, maintain an action on the case against a stranger for interfering with the rights acquired by the license. Thus, where a license was given by A to B to place drainage pipes across A's land it was held that B could maintain an action against C, a stranger, for tearing up the pipes although the court assumed that the license as between A and B was revocable by A.[99] Many questions of course arise in setting the precise limits to the legal remedy in cases of this kind, such as the correct measure of damages, whether the act of interference must be accompanied by malice or intention, and the like, but these questions cannot

[97]*Exclusive right to defendant's services.* Morris *v.* Colman (1812) 18 Ves. Jr. *437; Clarke *v.* Price (1819) 2 Wils. Ch. 157; Lumley *v.* Wagner, *supra,* footnote 32*; and cases cited in 1 Ames, Cases on Equity Jurisdiction 102 n. 3. *Exclusive trade discounts.* Dietrichsen *v.* Cabburn (1846) 2 Ph. 52. *Right of pre-emption.* Manchester Ship Canal *v.* Manchester Race Course Co., *supra,* footnote 32. *Not to carry on a business in competition with plaintiff.* Diamond Match Co. *v.* Roeber (1887) 106 N. Y. 473, 13 N. E. 419; 1 Ames, Cases on Equity Jurisdiction 124 n. 3. *Exclusive agency.* Singer, *etc.,* Co. *v.* Union, *etc.,* Co. (C. C. 1873) 22 Fed. Cas. No. 12,904.

[98]See *supra,* footnotes 89, 90, 91, and 92. Snowden *v.* Wilas (1862) 19 Ind. 10; *contra,* Morse *v.* Lorenz, *supra,* footnote 92; Herndon *v.* Durham & Southern R. R. (1913) 161 N. C. 650, 77 S. E. 683; Jackson & Sharp Co. *v.* Philadelphia W. & B. R. R. (1871) 4 Del. Ch. 180.

[99]Miller *v.* Township of Greenwich (1898) 62 N. J. L. 771, 42 Atl. 735; Miller *v.* Rambo (1901) 66 N. J. L. 191, 49 Atl. 453; Miller *v.* Rambo (1906) 73 N. J. L. 726, 64 Atl. 1053.

arise where the relief sought is an equitable injunction since it does not attempt to give relief for past wrongs but merely seeks to restrain the defendant from future acts injurious to the plaintiff and it is therefore much simpler to give relief in equity in these cases. In *Borough Bill Posting Co.* v. *Levy*[100] the owner of real estate contracted with the plaintiff to give the plaintiff the exclusive privilege of maintaining a billboard on the defendant's land. Thereafter the defendant revoked the license and contracted to give the same privilege to a third person who threatened to interfere with the plaintiff's exercise of his license. The court restrained both the owner of the land and the defendant to whom he had given the second privilege from the threatened interference.

This result, it is believed, is sound in principle although the right acquired was not a right of property in the licensor's land. The court ruled that the contract referred to did not operate to give the plaintiff a lease, but suggested that the result might be sustained on the ground that the contract operated to give the plaintiff an easement in gross. This suggestion, however, does not aid the result reached unless it be recognized that equity will protect contracts which ought to be specifically performed as against the wrongful acts of third persons since the easement in gross was not a property right giving rise to rights against third persons.[101] Once it is conceded that equity should enjoin the promisor from revoking his license, equitable principles require that like relief should be granted against third persons who interfere with the plaintiff's equitable right. The complications of modern social and business development are giving increased significance to contract rights, and if they can be protected only when they relate to some recognized form of property right, other than the contract involved, the opportunity for the commission of wrongs without adequate remedy will be greatly multiplied.

These considerations seem to have been given little weight in the recent case of *Sports, etc., Agency* v. *"Our Dogs" Pub. Co.*[102] In this case, one Fall obtained by agreement with the Ladies Kennel Association "a sole photographic right in connection with" a dog show organized by the Association. Fall subsequently sold and transferred his rights to the plaintiff. The defendants, who had

[100] *Supra,* footnote 67; see also Willoughby *v.* Lawrence, *supra,* footnote 81; Baldock *v.* Atwood (1891) 21 Ore. 73, 26 Pac. 1058; Standard American Pub. Co. *v.* Methodist Book Concern, *supra,* footnote 62.

[101] *Supra,* footnote 56.

[102] [1916] 2 K. B. 880, aff'd. (Ct. of App.) 61 S. J. 299.

full notice of the contract with Fall, were allowed to take photographs which they threatened to publish. In an action for an injunction the court denied relief on the sole ground that the contract between the Ladies Kennel Association and Fall created no property right which a court of equity could protect. It did not appear whether the plaintiff's damage was such that legal damages for breach of contract would be inadequate or whether the plaintiff's privilege of photography included, as it probably did, the right to publish the photographs, and it is possible to support the result actually reached on these grounds.

But if it be assumed that legal damages would be inadequate, it would seem that Fall would have been entitled to specific performance of his contract, and unless his right be deemed purely personal in character, it could have been transferred to the plaintiff, and that third persons in the situation of the defendant, who by procuring the violation of the contract with the plaintiff interfered with the plaintiff's equitable right, should on that ground have been enjoined from committing any acts which would prevent the plaintiff's securing the fruits of his contract. This is substantially what the English courts do in the case of the "tiedhouse" covenants in which the covenantor contracts not to use beer on his premises except that brewed by the plaintiff covenantee. Subsequent takers of the land are deemed bound by the covenant because their action in taking the land and repudiating the covenant deprives the covenantee of the benefits of his contract. His damages are inadequate since his business is affected, the damage being too speculative to be measured by a common law jury. It has also been held that the covenantee might transfer the benefit of his covenant by transferring the business to which it was incident. It is difficult to distinguish the case on the principle from *Borough Bill Posting Co.* v. *Levy*[103] and *Willoughby* v. *Lawrence*[104] where the exclusive privilege was upheld and an injunction issued against the third person for interfering with it. To say that in one case only a license was granted whereas in the other an easement in gross was granted, even if the easement in gross be deemed a property right, is altogether too narrow a basis of distinction. The wrongs done by the defendant and the injury suffered by the plaintiff

[103] *Supra,* footnote 67.

[104] *Supra,* footnote 81. For other cases where equity has enforced a license against subsequent purchasers from the licensor, see Thomas Cusack Co. *v.* Mann (1911) 160 Ill. App. 649; *contra,* Barbour *v.* Pierce (1872) 42 Cal. 657.

were substantially alike in character in both cases and they afford a proper case for the protection of a court having equity powers.

(d) From the foregoing discussion it is evident that the running of the burden of contracts against third persons in equity should not, on principle, be limited by the analogies of common law property rights and should be controlled rather by those doctrines which guide the exercise of judicial discretion of courts of equity and which are usually referred to under the somewhat misleading head of "hardship." It is obvious that equity, in enforcing the burden of contracts on third persons, has departed from the rules of property because of their inadequacy and inapplicability to certain situations. It will deny its own possibility of future growth and adaptability to new situations if it arbitrarily sets a limit to their departure by analogies to the law of property as developed by the law courts. There is nevertheless a split of judicial authority with reference to this question. In a number of jurisdictions, the courts have refused to impose a burden on subsequent takers of the covenantor's land where the restriction was not similar to a common law easement which could be created by grant or reservation. This was notably the case in *Norcross* v. *James*,[105] where the restriction was against opening or maintaining a quarry on the covenantor's land which would compete with the plaintiff's quarry on adjoining land, the court holding that, by analogy to the common law easement, no restriction could be imposed on the servient tenement which did not look "to the direct physical advantage in the occupation in the dominant estate." In *Hodge* v. *Sloan*[106] the opposite result was reached upon a similar state of facts, the court saying

> "I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. * * *
>
> "Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in

[105] *Supra*, footnote 28.
[106] *Supra*, footnote 36[a].

> a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity at least bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice, as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it."

And in *Brewer* v. *Marshall*[107] the court refused to follow the doctrine of *Norcross* v. *James,* but refused an injunction on the ground that the restriction upon the land was contrary to public policy, since it tended to restrain trade. The court, however, repudiated the doctrine that the application of the rule as to equitable burdens on the land should be limited by analogy to legal easements.[108] A legitimate limitation on the doctrine of the equitable burden, however, is the rule that such contracts will be strictly interpreted[109] and the rule that equity may in its discretion refuse relief where, owing to change of condition, enforcement of the restrictive covenant would be very burdensome to the defendant and of little benefit to the plaintiff.[110] As, however, this is not jurisdictional the court may grant relief unless defendant will pay plaintiff the

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[107](1868) 19 N. J. Eq. 537.

[108]See, supporting Hodge *v.* Sloan, *supra,* footnote 106, cases cited in 1 Ames, Cases on Equity Jurisdiction 186 n. 1. See supporting Norcross *v.* James, *supra,* footnote 28, Taylor *v.* Owen (Ind. 1830) 2 Blackf. 301; Kettle River R. R. *v.* Eastern Ry. of Minn. (1889) 41 Minn. 461, 43 N. W. 469; Tardy *v.* Creasy (1886) 81 Va. 553; American Strawboard Co. *v.* Haldeman Paper Co. (C. C. A. 1897) 83 Fed. 619.

[109]Ind, Coope, & Co., Ltd. *v.* Hamblin (1900) 84 L. T. R. (N. S.) 168; Duryea *v.* Mayor, *etc.,* of N. Y. (1875) 62 N. Y. 593; Blackman *v.* Striker (1894) 142 N. Y. 555, 37 N. E. 484; Minister, *etc.,* of Reformed, *etc.,* Church *v.* Madison Ave. Bldg. Co. (1914) 163 App. Div. 359, 148 N. Y. Supp. 519, aff'd. (1915) 214 N. Y. 268, 108 N. E. 444; Schoonmaker *v.* Heckscher (1916) 171 App. Div. 148, 157 N. Y. Supp. 75; Walker *v.* Renner (1900) 60 N. J. Eq. 493, 46 Atl. 626; Eckhart *v.* Irons (1889) 128 Ill. 568, 20 N. E. 687; Hutchinson *v.* Ulrich (1893) 145 Ill. 336, 34 N. E. 556.

[110]Duke of Bedford *v.* Trustees of British Museum (1822) 2 Myl. & K. 552; Jackson *v.* Stevenson (1892) 156 Mass. 496, 31 N. E. 691; Trustees of Columbia College *v.* Thacher (1882) 87 N. Y. 311; and cases cited in 1 Ames, Cases on Equity Jurisdiction 181 n. 9.

fair value of the restriction,[111] or it may even assess the value and direct the defendant to pay it instead of giving specific relief.[112] This power of the court to exercise its discretion in enforcing the restrictive covenant affords a much more flexible and adequate correction of the doctrine of equitable restrictions than it is possible to effect by the arbitrary adherence to the analogy to property interests in land.

[TO BE CONCLUDED.]

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[111]Amerman *v.* Deane (1892) 132 N. Y. 355, 30 N. E. 741; Rowland *v.* Miller (1893) 139 N. Y. 93, 34 N. E. 765; People *ex rel.* Frost *v.* New York Cent. & H. R. R. R. (1901) 168 N. Y. 187, 61 N. E. 172; McClure *v.* Leaycraft (1905) 183 N. Y. 36, 75 N. E. 961.

[112]*Supra,* footnote 110. Since the giving of a modified or substituted relief or the refusal to give relief in these cases is discretionary and not a matter of right, it would follow that the owner of land subject to a covenant which equity would not enforce against him, would, nevertheless, have no standing in equity to maintain a bill to have the covenant cancelled. In New York the right has apparently been given by statute. Code, Civ. Proc. § 1638. See St. Stephen's Church *v.* Church of Transfiguration, *supra,* footnote 71.